Nos. 92-484, 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, et al.,
Respondents.

STEPHEN R. STEINBRINK, et al.,
Petitioners,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, et al.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONERS

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The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with the provisions of Rule 37.3 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The national and state-based trade associations sponsoring this brief together represent virtually every commercial bank in the United States and most of their holding companies (if any), as well.

Commercial banks have relied upon the continued existence of Section 92 of the National Bank Act for the past three-quarters of a century in order to act as general insurance agents in small towns throughout much of the country. It is obvious that national banks would do so, since the law (if it exists) applies directly to those banks. But in addition to that, many state-chartered banks are affected as well. State banking laws in approximately thirty-seven states contain so-called "parity" or "wild-card" provisions that allow state chartered banks to exercise whatever powers national banks located in the state may possess, so the law applies indirectly to many state-chartered banks as well. Hundreds of banks located and doing business in small towns have invested funds, established business relationships and built reputations in their respective communities as insurance agents in reliance upon Section 92. Indeed, in some instances, the bank is the only insurance agent readily available in a small community.

In addition to those small town banks already engaged in the business of general insurance agency, there are others actively seeking to enter into that business, despite roadblocks erected by the competition. *See, e.g., Owensboro National Bank v. Moore*, 803 F. Supp. 24 (E.D. Ky. 1992), *appeal pending*, 6th Cir. Nos. 92-6330, -6331; *First Advantage Insurance v. Green*, No. 365352, 19th Jud. Dist.Ct. (Louisiana), filed January 16, 1991.

It is to protect these present and future interests of their respective members in the conduct of insurance activities in small towns that the American Bankers Association, Association of Bank Holding Companies, Association of Banks in Insurance, Consumer Bankers Association, Independent Bankers Association of America, Kansas Bankers Association, Minnesota Bankers Association, Missouri Bankers Association, Oregon Bankers Association, and Wisconsin Bankers Association respectfully appear in this case in order to urge the Court to reverse the decision of the District of Columbia Circuit below. That decision concluded that Section 92 of the National Bank Act does not exist, having been repealed, probably inadvertently, only two years after it was enacted, and in the context of an entirely unrelated legislative matter. Should that decision be affirmed, it would work great injustice to the settled expectations of commercial banks and their customers, to no good end.

SUMMARY OF THE ARGUMENT

In 1916, Congress enacted, and Woodrow Wilson signed, a bill significantly amending the three year old Federal Reserve Act. Among the multiple provisions of the statute was one that came to be known as Section 92 of the National Bank Act. It was unquestionably designed to grant to national banks located and doing business in small towns the power to sell insurance, as agent. A mere two years later, to assist in the funding of America's participation in the First World War, Congress enacted the War Finance Corporation Act. Among its multiple provisions was one that removed a restriction upon the ability of national banks to do business with these corpo-

rations. According to the District of Columbia Circuit, the latter statute repealed the former one, even though, admittedly, the subject matters of the two statutes were entirely unrelated to one another. It is only the placement of certain quotation marks in the 1916 statute that leads to this conclusion—quotation marks of unknown, clerical, origin. *Everything* else in the language of the statutes, in their manifest intent, in their legislative history, and in their subsequent treatment by Congress, by the federal regulatory agencies, by the banking and insurance industries, and by the courts, federal and state, cries out that decision below was wrong, and this Court should so hold.

ARGUMENT

I. Statutory Background

Section 5202 of the Revised Statutes of the United States was enacted in 1878, derived from Section 36 of the National Bank Act of 1864 which, in turn, was derived from Section 42 of the National Currency Act of 1863. Generally, it limited a national bank's authority to become indebted to the amount of its paid-in capital, and then set forth four short exceptions to that general rule.

In 1913, Congress enacted the Federal Reserve Act, Pub. L. 63-64, 38 Stat. 251 (1913). Section 13 of the Act contained a series of unnumbered paragraphs. The sixth one amended R.S. section 5202, setting forth its pre-existing text, including the original four exceptions to the general prohibition against excess indebtedness of national banks, and added a new fifth exception for "[l]iabilities incurred under the provisions of *the Federal Reserve Act*" (emphasis added).

Section 13 of the Federal Reserve Act then went on, in a seventh unnumbered paragraph, to authorize the Federal Reserve Board to adopt restrictions, limitations, and regulations upon the rediscount by a Federal Reserve bank of certain bills receivable, foreign bills of exchange and acceptances "authorized by *this Act*" (emphasis added).

The 1913 statute clearly did not make R.S. section 5202 a part of the Federal Reserve Act; otherwise the reference to "the Federal Reserve Act" in the amendment to R.S. section 5202 would have been superfluous. Similarly, the paragraph following the paragraph amending R.S. section 5202 was not made a part of R.S. section 5202. If it had been intended to be a continuation of the paragraph amending R.S. 5202, the internal reference to "this Act" would have made no sense whatsoever. R.S. section 5202 contained no authorization of bills of exchange or acceptances. Such an authorization was found in the second and third unnumbered paragraphs of section 13 of the Federal Reserve Act (*before* the paragraph amending R.S. section 5202.)

In summary, the amendment to R.S. section 5202 was contained only in the sixth unnumbered paragraph including the five numbered subparagraphs. The seventh unnumbered paragraph, like the first five, was part of the then new Federal Reserve Act.

In 1916, Congress amended the Federal Reserve Act. Among other things, the 1916 statute set forth a new version of section 13 of the Act "to read as follows:" The new version followed the same format as the prior version, containing a series of unnumbered paragraphs. Each of those paragraphs—with one exception—was preceded by quotations marks, which

was the grammatically correct thing to do after the phrase "to read as follows." The exception, of course, is what gives rise to the difficulty here. The unnumbered paragraph carrying forward the three-year old amendment to R.S. section 5202 was not preceded by a quotation mark. Textually, this unnumbered paragraph and its five numbered subparagraphs remained unchanged.[1] The unnumbered paragraph following the five numbered exceptions was a modification of the same paragraph as had appeared in the 1913 version of the Federal Reserve Act. It now provided for the discount, purchase and sale, as well as the rediscount of the same bills receivable, bills of exchange and acceptances "authorized by *this Act*." Again, despite the placement of quotation marks in the 1916 statute, there was no authorization in R.S. section 5202, as amended, for any such bills or acceptances.

As was earlier the case, that authorization appeared only in the Federal Reserve Act itself. Likewise as was earlier the case, R.S. section 5202's fifth numbered exception referred not to "this Act," but rather to "the Federal reserve Act," as a separate and distinct statute. The clear import of the *words* used, therefore, is that the unnumbered paragraph following the five exceptions was not a part of R.S. section 5202. Once that break is made, it is logical and grammatical to assume conclusively that unnumbered paragraphs following the bills of exchange and acceptances paragraph are likewise not part of R.S. section 5202. The unnumbered paragraph immediately following the bills of exchange and acceptance para-

[1] Except the 1916 version refers, in the fifth subparagraph, to the "Federal reserve Act," whereas in the 1913 version, the second word of that phrase also had an initial capital letter).

graph is the enactment of what subsequently became identified as section 92 of the National Bank Act.

Notwithstanding that, the District of Columbia Circuit concludes that all the paragraphs of Section 13 of the Federal Reserve Act that follow the words "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended to read as follows:" became a part of R.S. section 5202 in 1916 because "the troublesome quotation marks are located where they are, not where the parties argue the 64th Congress intended them to be."[2] However, the placement of the quotation marks in the enrolled bill actually had very little to do with the Congress itself at all. Instead, it was quite clearly an unknown scrivener's choice of punctuation, as is shown by a comparison of the 1916 Senate and the House Conference Reports[3] on "An Act to amend the Act approved December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, by adding a new section," with the final enrolled bill. The Senate version of the Conference Report contains no quotation marks in any relevant spot; the House version of the Conference Report contains handwritten quotation marks, but, in relevant part, those quotation marks are not where they eventually appear in the enrolled statute. The unnumbered paragraph preceding the revision to R.S. section 5202 does not end in a quotation mark in either the House or Senate ver-

[2] *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992).

[3] Copies of the two versions of the Conference Report were lodged with this Court as an Exhibit with the brief of your amici filed in support of the Petition for Writ of Certiorari on November 20, 1992.

sion of the Conference Report, but it does in the enrolled statute. The paragraph of the bill pertaining to R.S. section 5202 begins with a quotation mark in the House version of the Conference Report, but the enrolled bill does not. If *either* the Senate version or the House version had made it to the enrolled bill, we would not be here.

Two years after the passage of the relevant amendments to the Federal Reserve Act, Congress took up a bill that was later to become the War Finance Corporation Act, Pub. L. No. 65-121, 40 Stat. 506 (1918), an "Act to provide further for the national security and defense and, for the purpose of assisting in the prosecution of the war, to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes." The original bill did not contain the provision now said to repeal section 92. It was added as an amendment, which became section 20 of the War Finance Corporation Act. Section 20 amended R.S. section 5202 to read pretty much as it had read even prior to 1916. As noted above, the law forbade indebtedness of national banks in excess of paid-in capital, and then set forth exceptions to that general rule. Prior to the War Finance Corporation Act, there were five exceptions; the Act added a sixth: National banks could exceed indebtedness limits in case of "liabilities incurred under the provisions of the War Finance Corporation Act." When the amendment was introduced in the House of Representatives by Congressman Phelan of Massachusetts, the following colloquy took place:

> Mr. Longworth. Mr. Chairman, I reserve a point of order on that.
> Mr. Kitchin. I have examined that pretty thoroughly, and I think it ought to go in, I will say to the gentleman from Ohio.
> Mr. Longworth. *It is certainly not germane to this section.*
> Mr. Kitchin. If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of national banks from helping out these corporations.
> Mr. Longworth. I only reserved the point of order to hear the explanation.

56 Cong. Rec. 3804 (March 20, 1918) (emphasis added).

It was not an idle exchange. In the House of Representatives then, as now, there was a rule requiring an amendment to a bill to be germane. Rule XVI, Section 7, provided that "[n]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment." *See*: 5 A. Hinds, *Precedents of the House of Representatives of the United States* Vol. V, §§ 5753, 5767 and 5801 et seq. (1907). Since, as the District of Columbia Circuit correctly concluded, national bank insurance powers and financing of a war effort are unrelated,[4] a proposed amendment to the War Finance bill having the effect of repealing Section 92 of the National Bank Act could not have been entertained under the House's own rules. The colloquy set forth above there-

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[4] *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 737.

fore establishes that the only intended change in the law was the germane addition of the sixth exception to the rule against national bank indebtedness. Not only was it the only intended change, but the only permissible one as well. Anything beyond that would have been nongermane and out of order.

II. Subsequent History

After the enactment of the War Finance Corporation Act in 1918, the law that is said to repeal Section 92, both the Comptroller of the Currency and the Board of Governors of the Federal Reserve System continued to regard Section 92 as being in full force and effect. The Comptroller of the Currency publishes, and periodically updates, a Compilation of Federal Laws Affecting National Banks. Each time, since 1918, the compilation has been republished, it has included Section 92 as a law then presently in force. Similarly, the Board of Governors publishes, and periodically updates, "The Federal Reserve Act As Amended Through. . .", and also publishes and periodically updates a "Digest of Rulings of the Board of Governors of the Federal Reserve System." Each time, since 1918, that these documents have been republished, they have included, as a part of the then-existing Section 13 of the Federal Reserve Act, the language of Section 92. When the first edition of the United States Code was issued in 1926—eight years after the War Finance Corporation Act allegedly repealed Section 92—Section 92 appeared, as such, in the compilation of the "Laws of the United States of America of a General and Permanent Character." It likewise appeared in the 1928, 1934, 1940 and 1946 editions of the United States Code. Nowhere can there

be found any evidence of an adverse Congressional reaction to any of these publications—no Congressman or Senator ever seems to have protested that the publications were incorrect since the law had been repealed.

Although no Congressional action to repeal Section 92 occurred between 1946 and 1952, the 1952 edition of the United States Code omitted Section 92. That omission *did* spark a response from Congress. Extensive hearings were held on the subject in early 1958, and "an impressive array of witnesses"[5] assured and reassured Congress that the law was still in effect. *Financial Institutions Act of 1957: Hearings on S.1451 and H.R. 7026 Before the Committee on Banking and Currency of the House of Representatives*, 85th Cong., 2d Sess. 1010-1071 (1958). The two bills to which reference is made in the title of the Hearings contained a Section 45 that would have, if enacted, "restated" Section 92. Having been authoritatively advised that Section 92 was already law, Congress took no further action to adopt proposed Section 45 of the two bills, and it, or a comparable section, did not again appear in proposed legislation pertaining to financial institutions.

The court below too quickly dismisses forty years of history as irrelevant: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". (*Independent Insurance Agents of America v. Clarke*, 955 F.2d at 737 (citing

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[5] *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 736.

Russello v. United States, 464 U.S. 16, 26 (1983)).[6] That is not the point of the recitation of this history. The point is that, in 1958, if not before, Congress acquired

> knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the [] interpretation erroneous, it would have amended the section. Its failure to do so requires the conclusion that the regulation was not inconsistent with the intent of the statute. . .unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it.

Massachusetts Mutual Life Insurance Company v. United States, 288 U.S. 269, 273 (1933). (citations omitted.)

The Federal Reserve and the Comptroller had, by 1958, long interpreted the laws enacting or otherwise dealing with Section 13 of the Federal Reserve Act, Section 92 of the National Bank Act, Section 5202 of the Revised Statutes and Section 20 of the War Finance Corporation Act (with whose administration they were charged). The interpretations gave meaning and effect to the words of those statutes, and to the manifest intent of those statutes. Where there is a

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[6] Actually, this was an odd citation by the court below, since it elsewhere dismisses as irrelevant as well the intent of the earlier Congress: "Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand". *Id*, at 736. "[E]ven if we were persuaded that its repeal was in fact the result of cumulative mistakes by both Congresses. . .we would be hesitant to move into the breach." *Id.* at 739.

conflict between the words of a statute and its punctuation, there would seem at the very least to be sufficient ambiguity in the law so that the Federal Reserve's and Comptroller's interpretations would not fall into the category of *clearly* inconsistent with the statute.[7] If not *clearly* inconsistent, the agency interpretations may be said to have been adopted by Congress by virtue of its failure to have done anything to alter those interpretations when the matter was foursquare before the Congress.

If the mere failure to act on the matter in 1958 is insufficient evidence of legislative ratification of administrative interpretations of the law, later history is even stronger evidence. Not only did the regulatory agencies continue in their consistent view that Section 92 was valid law; the courts regularly treated the law as if it were in full force and effect as well. *See*

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[7] We would go further and maintain that the plain *language* of the statute is the best evidence of the intent of Congress, *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-375 (1986), whereas "[p]unctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 82-83 (1932). In any conflict between words and punctuation, the words must prevail. In *Marine Bank v. Weaver*, 455 U.S. 551, 557 n.5 (1982), for example, this Court held that a certificate of deposit was not a security even though the statutory definition of security included the phrase "certificate of deposit, for a security." The Court read that phrase as if the comma were not present, so as to have the statute refer to instruments issued by protective committees in the course of corporate reorganizations, instead of commercial bank certificates of deposit.

Commissioner of Internal Revenue v. First Security Bank of Utah, 405 U.S. 394, 401-405 (1972); *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 n. 6 (5th Cir. 1980); *Salyersville National Bank v. United States*, 613 F.2d 650, 652 (6th Cir. 1980); *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *Commissioner of Internal Revenue v. W. Morris Trust*, 367 F.2d 794, 795 n. 3 (4th Cir. 1966).

This Court long ago held that:

> It is doubtless a rule that when a judicial construction has been given to a statute, the reenactment of the statute is generally held to be in effect a legislative adoption of that construction. This, however, can only be when the statute is capable of the construction given it, and when the construction has become a settled rule of conduct.

The Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 237 (1874).

As we have seen above, the 1916 and 1918 statutes are capable of a construction that would permit Section 92 of the National Bank Act to continue in existence, and, of course, sixty some years of history fairly clearly constitutes a settled rule of conduct. Knowing that the agencies and the courts had construed the laws to the effect that Section 92 was then in full force and effect, Congress amended Section 92 in 1982, Pub. L. 97-320 § 403(b) and in 1987 it imposed, for a limited period of time, a moratorium upon the exercise of rights that national banks otherwise would have had "pursuant to the Act of September

7, 1916 (12 U.S.C. 92)" to expand their insurance agency activities. Pub. L. 100-86 § 201(b)(5).

These two affirmative acts by Congress certainly fit within the *Dollar Savings Bank* test for legislative adoption of judicial (and administrative) construction of statutes.

CONCLUSION

The fundamental error of the District of Columbia Circuit was its unwillingness to "correct[] flaws in the language and punctuation of federal statutes" where to do so would be "to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books." *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 739.

The court *presumed* that Congress has stricken the laws from the books, *presumed* that "correcting" punctuation errors would have the effect of "reinstating" the law. But in point of fact, proper application of the rules of statutory construction as outlined above should lead to the conclusion that the law was not repealed in the first place. It was not repealed because Section 92 of the National Bank Act was never made a part of section 5202 of the Revised Statutes, so that subsequent amendments to section 5202 had no effect upon Section 92. It was not repealed because Congress did not intend to repeal it,

and "[t]he intent, not the letter of the statute, constitutes the law." *Union National Bank of St. Louis v. Matthews*, 98 U.S. 621, 626 (1879). The opinion of the court below should be reversed and remanded for consideration of the issues that were brought before it by the parties.

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